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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE THOMAS J. WHELAN)

UNITED STATES OF AMERICA, Plaintiff, v. TOMAS SANTILLANES-LOPEZ, Defendant.	)	Case No.: 07cr3108-W Date: April 1, 2008 Time: 2:00 p.m. **STATEMENT OF FACTS AND POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS**

I.

STATEMENT OF FACTS

Mr. Santillanes-Lopez incorporates by reference the statement of facts previously provided to the Court. He provides the following statement in support of the instant motions.

Subsequent to arrest at the Calexico West Port of Entry , United States Immigration and Customs Enforcement Special Agents Jeffrey Gilgallon an Mario Vasquez contacted Mr. Santillanes-Lopez and read him his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), at 10:40 a.m. This was more than three and a half hours after he was placed under arrest. During that time, Mr. Santillanes-Lopez remained isolated in a holding cell.

Mr. Santillanes-Lopez purportedly waived his Miranda rights. In response to questions put to him by the agents, Mr. Santillanes-Lopez admitted knowledge of the cocaine discovered in the vehicle he had been driving. Thereafter, when asked to explain the events leading to his arrest, he told agents that he had only driven the car because he and his family were being threatened by several men; they ordered him to cross drugs to assure his family's safety. He told the agents that he had been forced to drive a car with drugs to the San Luis, Arizona port of entry in 2002 by the same men, for the same reasons - in particular a threat to kill his son, Tomas. As on that occasion, the contraband discovered in this case was hidden in a gas tank compartment, with an access port built into its top. It, too, was cocaine. It also appears that the packaging may have had a similar appearance - a grey exterior.

The 2002 crossing prompted federal charges to be filed in the federal district court in Yuma, Arizona. Mr. Santillanes-Lopez's 2002 federal criminal case in Arizona, however, was dismissed on motion by the United States Attorney's office with prejudice. See Exhibit A. Dismissal of the charges apparently was prompted by the results of a polygraph test administered to Mr. Santillanes-Lopez in the Arizona case by the Federal Bureau of Investigations. According to reports from that case, "the statements Santillanes had given were truthful." Exhibit B. "As a result of the polygraph examination, all charges against Santillanes were dismissed, with prejudice, in the interest of justice on October 28, 2002." Id.

Mr. Santillanes-Lopez told Agents Gilgallon and Vasquez that the same men who forced him to drive the vehicle in 2002 "found him again" and that "they were going to leave him and his family alone [only] if he made six trips [with drugs into the United States]."[1] He told the agents they may have suspected he informed on them in the 2002 case. He explained how, two months prior to his arrest in this case, these men - Gordo and Chavez - had taken him out to the desert near San Luis, Sonora, Mexico, and put a gun to his head. They told him they would spare his life in exchange for an agreement to make six trips crossing drugs for them. According to Mr. Santillanes-Lopez, this was his third time smuggling with the vehicle. After the sixth trip, they would have left him and his family alone.

II.

THE COURT SHOULD DISMISS THE INDICTMENT FOR FAILURE TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY AND ORDER DISCLOSURE OF GRAND JURY TRANSCRIPTS

Section 939.71 of the California Penal Code states in pertinent part:

> Exculpatory evidence; duties of prosecutor
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> If the prosecutor is aware of exculpatory evidence, the prosecutor *shall inform the grand jury* of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory

[1] The quotes are taken from the report prepared by Agent Gilgallon in this case.

> evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties under Section 939.7. If a failure to comply with the provisions of this section results in substantial prejudice, it shall be grounds for dismissal of the portion of the indictment related to that evidence.

Cal. Pen. Code § 939.71(a) (emphasis added). Pursuant to 28 U.S.C. § 530B(a), entitled ethical standards for attorneys for the government, "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal Court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B(a). The "shall" language in § 530B(a) makes California ethical obligation to present exculpatory evidence to a grand jury binding on federal prosecutors at the United States Attorney's Office for the Southern District of California. Because the government did not present exculpatory evidence to the grand jury in this case, dismissal is warranted.

In Johnson v. Superior Court of San Joaquin County, 15 Cal.3d 248 (1975), the California Supreme Court interpreted California Penal Code § 939.7, a precursor to the current § 939.71(a), and the obligations it imposed upon prosecutors seeking indictment before a grand jury. The court held that "when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under section 939.7 to inform the grand jury of its nature and existence, so that the grand jury may exercise its power under the statute to order the evidence produced." Id. at 254. The state court characterized the grand jury as the "great inquest" between the prosecuting body of government and the citizen; as such, it shall "make accusations only upon sufficient evidence of guilt, and to protect the citizen against unfounded accusation, whether from the government, from partisan passion, or private malice." Id. To infuse the grand jury's power "to protect the citizen against unfounded accusation," the court strictly read a district attorney's obligations pursuant to Cal. Pen. Code § 939.7 as including the duty to "fully and fairly present" evidence to the grand jury. Id. at 255.

The circumstances in Johnson are similar to the facts present in the present case. There, along with a co-defendant, the petitioner had been arrested for the sale of amphetamine tablets to an undercover narcotics agent. Id. at 251. Before his arrest, however, the petitioner had pled guilty in another drug case and received a beneficial sentencing recommendation from the government on the condition that he cooperate in other drug prosecutions. Id. at 252. The petitioner argued that the district attorney failed to present evidence of this agreement to the grand jury and his testimony at a preliminary hearing that he was in the vicinity of the drug sale to inform on the drug dealer. Id. at 252-53. The magistrate court held that this omission was fatal and dismissed the charges. Id. at 252. Based upon its interpretation of § 939.7, the California Supreme Court agreed with the magistrate's resolution of the conflict.

In this case, during the course of interrogation, Mr. Santillanes-Lopez informed agents that two men threatened him and his family. These same men had put a gun to his head at a remote desert location, and told him he would drive loads of drugs into the United States in exchange for his life being spared. This evidence tends to strongly support a claim of duress. The agents in this case also learned from Mr. Santillanes-Lopez that he had been arrested in Arizona in 2002 for similar conduct. The agents learned that the case was dismissed after a lie detector test confirmed the truth of his statements regarding threats against him and his family at that time as well. The similarities between the 2002 case and this one are profound. Agent Gilgallon's report, dated November 7, 2007, preceded the November 14, 2007 indictment, as did his receipt of reports by agents involved in the 2002 case.[2] Accordingly, because the prosecution was aware of this material exculpatory evidence, the grand jury assistant should have so informed the grand jury. Failure to do so constitutes a failure to "fully and fairly present" evidence as required pursuant to California Penal Code § 939.71(a) and violates due process resulting in substantial prejudice. The Court, accordingly, should dismiss the indictment.

At the least, grand jury transcripts should be ordered disclosed. The Court may order disclosure of grand jury proceedings "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). Mr. Santillanes-Lopez has presented a ground for dismissal of the indictment satisfying the rule's requirement.

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[2] The fax imprints on the two reports generated by agents in the 2002 case identify a receive date of November 8, 2007. See Exhibit B. Those reports detail Mr. Santillanes-Lopez's explanation of events leading to his arrest and the decision to dismiss subsequent to a polygraph examination, which confirmed the truthfulness of his statements.

III.

THIS COURT SHOULD SUPPRESS ANY STATEMENTS MADE BY MR. SANTILLANES-LOPEZ

A. The Court Must Suppress Mr. Santillanes-Lopez's Alleged Post-Miranda Statements.

1. *Miranda* Warnings Must Precede Custodial Interrogation.

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444 (1966).[3] Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Id. See Orozco v. Texas, 394 U.S. 324, 327 (1969).

Once a person is in custody, Miranda warnings must be given prior to any interrogation. See United States v. Estrada-Lucas, 651 F.2d 1261, 1265 (9th Cir. 1980). Those warnings must advise the defendant of each of his or her "critical" rights. United States v. Bland, 908 F.2d 471, 474 (9th Cir. 1990). If a defendant indicates that he wishes to remain silent or requests counsel, the interrogation must cease. Miranda, 384 U.S. at 474; see also Edwards v. Arizona, 451 U.S. 484 (1981).

According to government counsel, Mr. Santillanes-Lopez was questioned subsequent to arrest and made incriminating statements. Thus, the government is required to show that the agent(s) properly administered the Miranda warnings.

2. The Government Must Demonstrate That Any Alleged Waiver of Mr. Santillanes-Lopez's Rights Was Voluntary, Knowing, and Intelligent.

When interrogation occurs without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant intelligently and voluntarily waived his privilege against self-incrimination and his right to retained or appointed counsel. Miranda, 384 U.S. at 475. It is undisputed that, to be effective, a waiver of the right to remain silent and the right to counsel must be

[3] In Dickerson v. United States, 530 U.S. 428, 120 S. Ct. 2326 (2000), the Supreme Court held that Miranda rights are no longer merely prophylactic, but are of constitutional dimension. Id. at 2336 ("we conclude that Miranda announced a constitutional rule").

made knowingly, intelligently, and voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The standard of proof for a waiver of these constitutional rights is high. Miranda, 384 U.S. at 475. See United States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984) (the burden on the government is great, the court must indulge every reasonable presumption against waiver of fundamental constitutional rights).

The validity of the waiver depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Edwards v. Arizona, 451 U.S. 477, 472 (1981); Johnson v. Zerbst, 304 U.S. 458, 464 (1983). See also United States v. Heldt, 745 F.2d at 1277; United States v. McCrary, 643 F.2d 323, 328-29 (9th Cir. 1981).

In Derrick v. Peterson, 924 F.2d 813 (9th Cir. 1990), the Ninth Circuit confirmed that the issue of the validity of a Miranda waiver requires a two prong analysis: the waiver must be both (1) voluntary, and (2) knowing and intelligent. Id. at 820. The voluntariness prong of this analysis "is equivalent to the voluntariness inquiry under the [Fifth] Amendment . . . ." Id.

The second prong, however, requiring that the waiver be "knowing and intelligent," mandates an inquiry into whether "the waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Id. at 820-21 (quoting Colorado v. Spring, 479 U.S. 564, 573 (1987)). This inquiry requires that the court determine whether "the requisite level of comprehension" existed before the purported waiver may be upheld. Id. Thus, "[o]nly if the `totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Id. (quoting Colorado v. Spring, 479 U.S. at 573) (emphasis in original) (citations omitted)).

Under prevailing Ninth Circuit law, the Government bears the burden of demonstrating a Miranda waiver by clear and convincing evidence. See Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000) (en banc) (constitutional rights may ordinarily be waived only if it can be established by clear and convincing evidence that the waiver is voluntary, knowing, and intelligent) (citations omitted). Moreover, this Court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." Id. (citations omitted). Unless and until the prosecution meets its burden of demonstrating through evidence that adequate Miranda warnings were given and that the defendant knowingly and intelligently waived his rights, no evidence obtained as result of the interrogation can be used against the defendant. Miranda, 384 U.S. at 479.

Until the government meets its evidentiary burden of showing that the Miranda warnings were sufficient or that the Miranda rights were knowingly or intelligently waived, the statements obtained from Mr. Santillanes-Lopez must be suppressed.

B. Any Statements by Mr. Santillanes-Lopez Were Involuntary.

Even when the procedural safeguards of Miranda have been satisfied, a defendant in a criminal case is deprived of due process of law if the conviction is founded upon an involuntary confession. Arizona v. Fulminante, 499 U.S. 279 (1991); Jackson v. Denno, 378 U.S. 368, 387 (1964). The government bears the burden of proving by a preponderance of the evidence that a confession is voluntary. Lego v. Twomey, 404 U.S. 477, 483 (1972).

In order to be voluntary, a statement must be the product of a rational intellect and free will. Blackburn v. Alabama, 361 U.S. 199, 208 (1960). In determining whether a defendant's will was overborne in a particular case, the totality of the circumstances must be considered. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Some factors taken into account have included the youth of the accused, his lack of education, his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. Id. The fact that the statement occurred subsequent to the six-hour safe harbor period also is of consequence. See 18 U.S.C. § 3501.

A confession is deemed involuntary whether coerced by physical intimidation or psychological pressure. Townsend v. Sain, 372 U.S. 293, 307 (1962). "The test is whether the confession was `extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.'" Hutto v. Ross, 429 U.S. 28, 30 (1976) (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)). Accord, United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981).

Until the government meets its burden of showing all statements of the defendant that it intends to use at trial were voluntary, all statements must be suppressed as involuntary.

C. Mr. Santillanes-Lopez Requests That This Court Conduct An Evidentiary Hearing.

This Court must make a factual determination as to whether a confession or statements were voluntarily given prior to their admission into evidence. 18 U.S.C. § 3501(a). Where a factual determination is required, courts are obligated by Fed. R. Crim. P. 12 to make factual findings. See United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Because "'suppression hearings are often as important as the trial itself,'" id. at 609-10 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)), these findings should be supported by evidence, not merely an unsubstantiated recitation of purported evidence in a prosecutor's responsive pleading.

Under section 3501(b), this Court must consider various enumerated factors in making the voluntariness determination, including whether the defendant understood the nature of the charges against her and whether she understood her rights. Without the presentation of evidence, this Court cannot adequately consider these statutorily mandated factors. Mr. Santillanes-Lopez accordingly requests that this Court conduct an evidentiary hearing pursuant to 18 U.S.C. § 3501(a), to determine, outside the presence of the jury, whether any statements made by the defendant were voluntary.

IV.

COMPEL FURTHER DISCOVERY

In light of the 2002 federal criminal case that had been filed in Arizona, but dismissed subsequent to polygraph examination confirmed the truthfulness of statements pertaining to issues of duress, Mr. Santillanes-Lopez seeks additional discovery from the government.

Mr. Santillanes-Lopez requests production of all materials pertaining to the lie detector test conducted by the FBI in the 2002 Arizona case, including test results, reports, notes, etc., generated. Mr. Santillanes-Lopez also requests disclosure of the name(s) of the individuals who administered the examination as reports provided did not disclose that information.

Mr. Santillanes-Lopez requests production of any reports or materials from the Arizona case, including but not limited to reports not already disclosed[4], photographs of the vehicle, compartment, packages of contraband, etc., witness statements (including any generated as a result of any investigation),

[4] Mr. Santillanes-Lopez already received reports from the 2002 case dated August 20, 2002 and September 29, 2002.

videotaped or recorded statements by Mr. Santillanes-Lopez, any tests of the contraband discovered, and any reports by experts bearing upon the contraband or decision to dismiss. Such material is discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963).

Finally, Mr. Santillanes-Lopez requests production of any follow-up reports in this case.

V.

CONCLUSION

For these and all the foregoing reasons, the defendant, Mr. Santillanes-Lopez, respectfully requests that this court grant his motions and grant any and all other relief deemed proper and fair.

Respectfully submitted,

/s/ Jason I. Ser

DATED: March 18, 2008

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